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42413—14——1

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

SILAS A. GILSON, APPELLANT,
v.
THE UNITED STATES.
No. 207.

ON APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is a suit by the United States to cancel a patent issued under the homestead laws to one Daniel Landis for 120 acres of land in the North Yakima land district, in the State of Washington.

Landis made entry of the land November 13, 1899, and offered commutation proof under section 2301, Revised Statutes, November 21, 1902, upon which a patent was issued to him July 21, 1903 (R. 5). The bill alleged that the affidavit made by Landis upon which his original application was allowed was false and fraudulent in that he did not make his application in good faith for the purpose of actual settlement and cultivation,

but that it was made for the benefit of Silas A. Gilson, with whom the entryman was then acting in collusion for the purpose of giving the defendant Gilson the benefit of the entry (R. 3); that the proof of settlement and cultivation offered in support of the entry was also false and fraudulent in that the entryman had not made settlement on November 13, 1899, or at any other time; had not built a house except a partially completed shanty; had not resided on the land; had not broken 13 acres and cultivated 3 acres, as alleged in his final proofs, or any other portion of the land; and that the statement made in his affidavit that he had not alienated any part of the land was also false, as he had alienated, or agreed to alienate, it to the defendant Gilson (R. 4).

The bill further alleged that on November 21, 1902, the day on which he offered proof, the entryman executed a mortgage on the land to Gilson and on July 13, 1903, deeded him the land, all of which had been agreed upon between Landis and Gilson prior to the time of making proof (R. 5); that at all of the times mentioned the defendant Gilson knew of the false and fraudulent acts of the entryman and that the original entry was made not for the benefit of Landis but for Gilson's (R. 6).

The defendant answered the bill denying the allegations of fraud and, as an affirmative defense, set up that at the time of making proof the entryman was indebted to him in the sum of $640 actually loaned and advanced to Landis upon the latter's

promise to repay the same; that the records of the land office showing that Landis was entitled to a patent for the land upon the payment of the purchase price of $300, the defendant loaned him that sum, which was a part of the $640 in which Landis was indebted to the defendant, and that it was to secure that indebtedness that the mortgage was given (R. 17); that on July 13, 1903, believing that Landis was the actual owner of the land in fee, the mortgage being wholly unpaid and unsatisfied and Landis being indebted to him in the sum of $672, principal and interest, and the land-office records exhibiting all of the facts and proceedings, the defendant agreed with Landis for the purchase of said lands for the price of $672, whereupon he made the deed to the defendant in satisfaction of the indebtedness.

It was further alleged in the answer that the fair market value of the land at the time of defendant's purchase did not exceed $500 (although the defendant's jurisdictional affidavit (R. 113) avers that it is now worth not less than $5,000); that the mortgage was taken in good faith and defendant purchased the land in good faith, paying full value therefor, and in virtue of the premises became a bona fide purchaser for full value without any notice of any facts whereby the validity of the entry might be impeached (R. 18).

Testimony was taken by an examiner and, from the evidence submitted by both parties, the district court found the facts to be as follows:

> Gilson owned land adjacent to the tract which is the subject of this suit which he

wished to make use of for pasture, and with that object in view he induced Landis to locate and live in the vicinity to keep up his (Gilson's) fences. Not feeling able to pay a man's wages for the light labor of caring for fences, it was arranged for Landis to earn compensation by exercise of his homestead right. Gilson procured from a prior claimant a relinquishment and the right to appropriate a cabin which was then upon the land and which constituted the only habitation on the land then or since. The only other improvements on the land consist of about ten acres upon which the sagebrush has been grubbed, and about three acres which was ploughed once and planted to wheat, which never yielded a crop worth harvesting.

Landis filed his claim under section 2289 of the Revised Statutes of the United States in November, 1899, and commuted under section 2301, Revised Statutes, in November, 1902, and a patent was issued in July, 1903. The evidence on which the register and receiver allowed the commutation entry included sworn statements by Landis and two witnesses to the effect that the claimant had lived continuously on the land and made improvements, including a corral and chicken house, and that he had cultivated three acres three seasons. That was a false statement, there having been no ploughing or cultivation except during the third year. The land is dry sagebrush land and not productive without irrigation. The only return from the wheat which was planted on the three acres was

eaten by sheep owned by a firm named Jackson & Cameron.

Gilson furnished the meager supplies on which Landis subsisted during the period of his occupancy of the land, or gave him at different times money in pittances sufficient to buy necessaries, and also furnished the money paid to the Government for the land, including the land-office fees. On the same day that the commutation entry was made Landis gave a mortgage on the land to Gilson and he then ceased to live on the land. He also deeded the land to Gilson immediately after the patent was issued.

Section 2301, Revised Statutes, authorizes persons who have taken the benefits of section 2289 to pay the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry, and obtain a patent therefor upon making proof of settlement and of residence and cultivation for a period of fourteen months. This statute is to be construed in harmony with the policy of the public land laws allowing actual settlers, in good faith, the privilege of acquiring land in limited quantities for actual cultivation and use. Manifestly it is contemplated that a bona fide settler will, during a period of fourteen months, make such progress in the improvement of his claim as will tend to make it habitable and productive. A man old and infirm, as the evidence shows Landis to have been, could not be expected to do as much as one younger and stronger, and nonproductive sagebrush land

> could not be tilled profitably without irrigation. But after making due allowance for the conditions shown to exist, the conclusion is unavoidable that Landis made only a pretense of settlement and a show of improving the land merely to satisfy the scruples of the witnesses upon whom he depended to make final proof. If it had been his intention to make a home he would, instead of expending his labor in grubbing sagebrush, have provided a well; and instead of doing a thing so useless as to plant wheat, he would have made provisions for keeping chickens or to irrigate enough ground to supply him with necessary vegetables.
>
> The defendant Gilson was cognizant of every detail of the transaction at the different stages from the inception to the issuance of the patent, and, indeed, he instigated and directed the proceedings at every step, therefore he can not claim to be a bona fide purchaser from Landis (R. 97).

Gilson appealed to the Circuit Court of Appeals, where the decree of the lower court was affirmed, Circuit Judge Gilbert, who rendered the opinion, saying (185 Fed. 484):

> It is true there is no very specific testimony that an understanding between Landis and the appellant was had before the entry was made that the title was to be acquired for the latter. The appellant denied that there was any such understanding, and Landis was dead at the time when the testimony was taken, but there were circumstances and testimony clearly

pointing to that conclusion, and we can not say that they were insufficient to sustain the finding of the court below. Landis was past seventy years of age, was decrepit, and destitute. The appellant sought him out, took him to the land and pointed it out to him, induced him to settle on it, and negotiated and paid for the relinquishment of a prior settlement thereon. He paid the fees incident to the entry, and the fees when final proof was made. There is evidence that he was cognizant of the nature and extent of the improvements and cultivation made by Landis, and that he was aware of the untruth of the final proofs which were made of such settlement and cultivation. From the time of the entry Landis was engaged in doing light jobs of work for the appellant, whose house was but a quarter of a mile from the claim in question, but there was no agreement as to wages, and during the whole period of Landis's residence on the land the appellant furnished him groceries and supplies and small sums of money from time to time for his support, all without any security for repayment. There was evidence of statements made by Landis to others to the effect that he had entered the land to obtain the same for the appellant and not for himself. On the date of the commutation the appellant gave him $100, and he surrendered the possession. In view of all these facts, we find no error in the conclusion which the trial court reached, that the patent should be canceled, and it becomes unnecessary to consider the questions of law

suggested by the appellant, who urges that inasmuch as the final proof was not made under section 2291, but was made under section 2301 of the Revised Statutes, proof that the claimant had made an agreement before commutation to deed his land to another could not affect the validity of the title obtained from the United States, for the reason that section 2301 prescribes as requisite to commutation proof only, that the entryman has made settlement, cultivation, and residence for fourteen months, and does not require him to make oath that he has not alienated any portion of the land. (R., 108–109.)

THE QUESTIONS PRESENTED.

The questions presented are (1) the questions of fact, whether there was an agreement between Landis and the appellant that the land should be acquired by the former for the latter, and whether such agreement, if made, occurred before or after the original entry; (2) the question of law, whether such an agreement (obviously unlawful if made before the original entry) was also unlawful if made afterwards, but before the commutation proof was offered; (3) the question of fact, whether Landis's commutation proof concerning his cultivation and improvements was false; and (4) the question of fact, whether Gilson had notice of such false testimony before he purchased.

STATEMENT OF THE ARGUMENT.

I.

Both courts below having concurred in finding that there was an unlawful agreement between the entryman and the appellant whereby the former was to enter the land and procure title for the latter, that the testimony respecting cultivation and improvements was false, and that the appellant was on notice of the fraud before he purchased, the findings should not be disturbed unless manifestly erroneous.

II.

The findings were not erroneous.

(*a*) As a matter of law any agreement to alienate made by the entryman before commutation or final proof is unlawful; and no distinction is to be drawn between agreements made before and agreements made after the original entry but antedating that full compliance with the law which earns the title.

(*b*) The evidence fully justifies the conclusion that there was an unlawful agreement to alienate which preceded the original entry and persisted until the actual purchase by the appellant.

(*c*) The evidence proves clearly that the entryman offered false and fraudulent testimony concerning the extent of his cultivation and improvements.

(*d*) The evidence proves conclusively that the appellant knew what the improvements and cultivation actually were, and justifies the inference that he knew they were fraudulently exaggerated in the commutation proofs.

ARGUMENT.

I.

Both courts below having concurred in finding that there was an unlawful agreement between the entryman and the appellant whereby the former was to enter the land and procure title for the latter; that the testimony respecting cultivation and improvements was false; and that the appellant was given notice of the fraud before he purchased, the findings should not be disturbed unless manifestly erroneous.

It is unnecessary to elaborate this point as the rule is well settled in this court. *The Texas and Pacific Railway Co.* v. *Railroad Commission of Louisiana*, decided by this court February 24, 1914, No. 186, October term, 1913.

However, counsel for the appellant, while apparently conceding the rule, contend that it does not apply here, for the reason that the trial court did not hear the testimony, which was taken by an examiner, and therefore did not have an opportunity of observing the demeanor of the witnesses. We can not accede to this. In the case of the *Texas and Pacific Railway Co.* v. *The Railroad Commission of Louisiana, supra*, in which the rule was so recently and so clearly announced by this court, not only was the testimony not heard by the trial court but it was taken by a master whose report was set aside by the court on the ground that it was not supported by the evidence.

II.

The findings were not erroneous.

(*a*) *As a matter of law any agreement to alienate made by the entryman before commutation or final proof is unlawful; and no distinction is to be drawn between agreements made before and agreements made after the original entry but antedating that full compliance with the law which earns the title.*

The homestead law (R. S. 2289 et seq., as amended by the act of March 3, 1891, 26 Stat., 1098), requires any person applying for its benefits to make oath that—

> * * * such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation, and that he or she will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that he or she is not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate, to give them the benefit of the land entered, or any part thereof, or the timber thereon; that he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself, or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or

> manner, with any person or persons, corporation, or syndicate, whatsoever, by which the title which he or she might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person, except himself or herself. (Sec. 2290.)

In making final proof the entryman is required to make "affidavit that no part of such land has been alienated, except as provided in section 2288," which permits alienation for certain enumerated purposes, none of which exists in this case (sec. 2291). While section 2301 has nothing to say as to alienation, its sole purpose was to give the entryman the option to acquire title after fourteen months by substituting payment of the minimum price of the land for a portion of the five-year period of residence and cultivation required by section 2291. The original purpose of the entryman must be the same in either case: The acquisition of a home for his own benefit; and that purpose must persist throughout the entire period of residence and cultivation, whether five years or fourteen months.

A case directly in point is that of *Bailey* v. *Sanders*, decided at the last term of this court (228 U. S., 603). The entryman in that case, after making the original entry, and some two or three months before the commutation proof, entered into an agreement with one Bailey whereby the latter was to pay the expense of the commutation and the entryman was to convey the land to Bailey for an additional consideration

when the commutation was filed. In that case, as in this, it was contended that the homestead law does not prohibit the entryman, in advance of commuting his entry, to sell his land; but the contention was held to be not sound, Mr. Justice Van Devanter, who rendered the opinion, saying that the only purpose of section 2301 was to give the entryman an option to substitute the minimum price of the land for a part of the five years of residence and cultivation otherwise required, and that in other respects the operation and application of sections 2290 and 2291 were not affected by it.

(*b*) *The evidence fully justifies the conclusion that there was an unlawful agreement to alienate, which preceded the original entry and persisted until the actual purchase by the appellant.*

The situation existing at the time of entry is shown by the appellant's testimony to be substantially as follows: Gilson lived near the land involved and needed some assistance in looking after his pastures. Not being able to pay a man's full wages, upon inquiry he sought out the old man Landis and made arrangements with him, suggesting that Landis "come up and do some work for me," saying that there was land there to be entered (R. 74–75). Gilson had known Landis only two or three days before the entry was made (R. 69). Landis had no money and appellant advanced it to pay the Government fees and other expenses without taking security (R. 71). He could not remember the amount. He also ad-

vanced the money to purchase the relinquishment of a former entryman (R. 93).

The appellant continued to furnish Landis money from time to time until the commutation proof was made when he advanced "something like $400" (R. 72). Appellant took Landis to town when the proof was made and the land was mortgaged that same day to appellant, who had "already arranged to get the money that day, provided the proof was all right"—that mortgage secured *all* the money that appellant had advanced to the entryman (R. 73), and it had been arranged a month or two before proof was made (R. 74, 93).

Counsel for appellant would make it appear that the only evidence offered to show the agreement between Landis and Gilson consisted of the testimony of three of the Government's witnesses mentioned on pages 16 to 23 of their brief. Counsel designate the statements of these witnesses as "unnatural in their nature, meager and rambling" and urge that they are not sufficient to overcome the positive denial under oath of the appellant Gilson.

We contend, however, that the testimony elicited from the appellant himself on cross-examination constitutes strong evidence of an agreement between him and the entryman. When it is remembered that the appellant took up this old man Landis whom he had never seen before and of whom he knew nothing, located him on vacant public land adjacent to appellant's home, advancing all the money necessary to make the homestead entry and furnishing other sums

from time to time, it requires no stretch of the imagination to reach the conclusion that from the inception of the proceedings it was his definite purpose to use the old man to acquire title to the land. This conclusion finds ample support in the testimony of several of the Government's witnesses, which we submit is neither meager nor rambling.

Witness C. A. Bryant testified positively that in a conversation with Gilson in March, 1902, the latter stated that he owned the building on the land and was going to get the land (R., 34).

D. T. Meyers related a conversation had with the entryman Landis prior to the offer of proof, in which the latter said that he had filed a homestead right for Mr. Gilson, who was to give him (Landis) $100; in another conversation after proof was made, Landis said that he had received his $100 from Gilson. He made the same statement to witness several times afterwards, that Gilson was furnishing all expenses, paying everything, and Landis was to get $100 for his homestead right (R., 36). This witness was positive as to the first conversation had with Landis after the latter had made proof, because he was unusually well-dressed and "looked better than common," upon which the witness made the remark "You are looking pretty good to-day," and Landis answered, "Yes; I just got my money out of Gilson" (R., 38).

Witness R. A. Grant testified to a conversation with the entryman in which the latter said that he

had an arrangement with Gilson to take up the land; that Gilson was to supply him with a little money for work to be done on Gilson's land. (R., 41.)

Witness Joseph H. Lancaster, who knew Gilson well (R., 68), testified to a conversation with the latter in 1904, during which Gilson stated that if Lancaster would make an entry such an arrangement could be made as had been made with Landis; that he, Gilson, would do the same with Lancaster as he had done with Landis; that under the homestead law every man that had a homestead could mortgage his place to prove up on it (R., 45); and that he, Gilson, would furnish the money to prove up and give $150 or $200, the same as he had done with Landis.

This testimony, when considered in connection with the appellant's admissions, leaves little room for doubt that the entry was made under a prior agreement.

As evidence that there was no prior agreement for the making of this entry and its commutation, counsel for appellant invite attention to the fact that while the original entry was made November 13, 1899, the commutation proof was not offered until November 22, 1902, three years thereafter, and urge that if the parties had intended to acquire title in violation of the law, the offer of commutation would not have been so long delayed. This argument proves nothing. In answer we might suggest that Landis was an old man, weak both physically and mentally. It might have been the original purpose

to make a five-year proof, which was frustrated by the entryman's weakened condition. This suggestion finds support in the fact that there was no cultivation of the land whatever until commutation proof was offered or shortly thereafter.

(c) *The evidence proves conclusively that the entryman offered false and fraudulent testimony concerning the extent of his cultivation and improvements.*

Witness Bryant, for the Government, testified that the only improvements upon the land in the spring of the year 1902 was a rough shack about 12 by 16 feet and between five and eight acres of land from which the sagebrush had been grubbed, and that there were no wagons, tools, or farming implements of any kind upon the place (R. 24); that none of the land had been broken at that time and no crop had been planted. (R. 25.)

Witness Fred Seymour said that he had passed the place a number of times and had seen no one living there, nor had he seen anything around the house in the way of tools or improvements to indicate that anybody lived there (R., 26); that if anybody had been living on the land he would have known it (R., 27); that both Landis and Gilson approached him before proof was made to get him to act as a witness, and when he asked whether the necessary farming had been done and improvements made, Gilson replied that the ploughing had not been done but it would be before proof was offered (R., 27).

I. S. Brooks, clearly an unwilling witness for the Government, testified that Landis lived with him one winter before making proof (R., 29); that Gilson went to Brooks's place and got Landis, then went up to the homestead, staying a day or two, and after that witness went there and they were ploughing and wheat was sown *after* they proved up (R., 30).

Witness Lancaster testified that there had been no ploughing or cultivation until the year 1903, when perhaps three acres were planted in wheat (R., 43); that the only improvements on the land consisted of a small house worth about $25 or $30 (R., 45). This witness, who kept a diary, was positive that no ploughing had been done when he was on the land in January, 1903 (R., 48).

In the final proof both witnesses for the entryman testified that the improvements consisted of a house, about three acres fenced, 13 acres cleared, a chicken house, corrals, and so forth, valued at $250, and that three acres had been cultivated for three seasons (R., 59–61). From the testimony of the witnesses mentioned above, it is clear that the improvements were worth nothing like $250. There was no fencing whatever, no buildings except a small shanty, and no part of the land had been cultivated for three seasons. Three acres planted in wheat were not even ploughed until just before proof was made, if, indeed, they were ploughed at any time prior to January, 1903. According to the testimony of witness Brooks the planting was done *after proof* was made.

To earn title under the homestead law the entryman must *reside upon and cultivate* the land for the specified period. The performance of one of these requirements is not sufficient (*United States* v. *Mills*, 190 Fed. 513). In this case there was little, if any, residence and substantially no cultivation—certainly not enough to justify the belief that the entryman ever intended to establish a home in good faith.

(*d*) *The evidence proves conclusively that the appellant knew what the improvements and cultivation actually were and justifies the inference that he knew they were fraudulently exaggerated in the commutation proof.*

The appellant admitted that he talked to the parties who were to act as proof witnesses.

> I talked with them to find out if the proof would be all right or not and they could testify enough to make a substantial proof of it.
>
> Q. Well, now, did you know what the improvements were on the land at the time you talked with these parties?
>
> A. Yes, sir. (R., 67.)

He further admitted that he had done the ploughing on the land (R. 75), and that Landis had no farming implements "to amount to anything" (R. 80). He lived in sight of the place (R. 77), delivered groceries to Landis (R. 83), and saw him the day proof was made. They probably went to town together (R., 69–73).

Witness Seymour for the Government testified that he was approached by both Gilson and Landis and asked to act as one of the proof witnesses, but,

as witness had recently passed the place and seen no "farming done," he asked whether the necessary work had been performed, to which Gilson replied that "the ploughing was not done" and that it would be before the time expired (R., 27). This was not long before proof was made, and the appellant, who admitted that he had done the ploughing, necessarily knew that there had been no cultivation.

The entire evidence shows that the appellant was thoroughly familiar with every detail of the matter from the making of the entry to the offering of the proof. He caused the entry to be made, furnishing the money to buy out a prior settler. He assisted in procuring the proof witnesses and was in town when they testified. He advanced the money to pay all expenses, including the price of the land, and, having such interest in the outcome, there can be little doubt that he knew what the testimony was and how grossly it misrepresented the true situation.

CONCLUSION.

We submit that the action of the lower courts should be affirmed.

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MAY, 1914.

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